

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1360

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

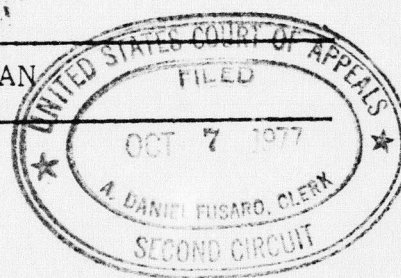
Docket No. 77-1360

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
IVAN GOLDMAN, et al.,
Defendants-Appellants.

B
P/S

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT IVAN GOLDMAN



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BRIEF FOR APPELLANT IVAN GOLDMAN

Preliminary Statement

This is an appeal by the defendant Ivan Goldman from his conviction in the United States District Court for the Southern District of New York on three counts of violating Title 18, U.S.C. §2314. After a jury trial, appellant Goldman was sentenced by District Court Judge Goettel to one year imprisonment. It is from this conviction and sentence that appellant appeals.

Statement of Facts

The indictment lodged against appellant, Ivan Goldman, and his co-defendant, Rudy Lewis, charged them with conspiring to violate Title 18 U.S.C. §2314. The indictment further

charged Goldman with four separate counts of the substantive violation of §2314 in Counts 2,3,4 and 5 and further charged Rudy Lewis with four substantive violations of §2314 in Counts 6,7,8 and 9. The substantive charges against appellant Goldman involved different dates, shipment and amounts than those charged against the co-defendant, Lewis.

The trial of this action took two days and prior to the case being submitted to the jury the court dismissed the conspiracy count against both Goldman and Lewis and further dismissed Count 2 of the indictment against appellant Goldman on the grounds that the jurisdictional amount had not been proven. After two days of deliberation and the judge reading the jury an "Allen" charge, the jury returned a verdict of "guilty" on all counts submitted to it against both Goldman and Lewis.

The case against appellants was adduced as follows.

The first witness to testify was Michael Cohen, a freelance textile broker who testified that as a freelance broker he would sell fabrics to various jobbers around the city and that he sold goods on behalf of Guilford Mills, the employer of Goldman and Lewis to a firm known as Bayer & Eisenberg. At first, Bayer and Eisenberg would pay Guilford Mills directly for the goods received, but there came a time when Mr. Cohen would bill Bayer & Eisenberg directly and be paid by them for the goods shipped from Guilford Mills. (A 15-16) */

*/ All "A" references are to the Appendix; all "R" references to the Record.

According to Cohen, he was paid by check for the goods which he, in turn, would cash and pay to appellant Goldman. Cohen claimed that this occurred on March 7, 1975, April 16, 1975, April 25, 1975 and May 2, 1975, the charges contained in the indictment against appellant Goldman. He further testified that after Goldman left the employ of Guilford Mills, he continued to do business with Bayer & Eisenberg and paid cash to Mr. Lewis on the dates set forth in the counts against Lewis.

Mr. Cohen testified that the cash basis was not an unusual way of doing business (A 17). He further indicated that he did not believe anything was wrong with the method of the transactions and the first time he knew there was a problem was when he was contacted by the FBI.

The next witness to testify was Philip Eisenberg, an owner of Bayer & Eisenberg. Mr. Eisenberg essentially testified that he did business with Mr. Cohen with regard to Guilford Mills fabrics. He indicated that at first he paid a factor of Guilford Mills but thereafter paid for the goods directly to Michael Cohen (A 32-33). He indicated that he did not regard the price that he was charged as "unusual" nor did he find the procedure used by Mr. Cohen in cashing the checks unusual (A 35-36). He acknowledged receipt of the goods sent by Guilford which were the subject matter of the charges in counts 2,3,4 and 5 against appellant Goldman.

The next witness was Robert Duncan, Jr., who was the director of billing and shipping for the Cranston Print Works in North Carolina, a supplier of fabric to Guilford Mills. Mr. Duncan testified that he shipped out the particular goods which were the subject matter of the charges against Goldman and that the goods were shipped to Bayer & Eisenberg in the ordinary course of Cranston's business. He further testified that the orders were placed by one "Nancy" for the goods which Ivan Goldman was accused in the indictment of transporting in interstate commerce. As to the goods which were alleged to have been converted or stolen by Mr. Lewis, the witness indicated that in fact the goods were ordered released by Rudy Lewis, himself. Mr. Duncan indicated no knowledge of Ivan Goldman (R 230).

The next witness to testify was Nancy Kames, who is employed by Guilford Mills in the New York office where Mr. Goldman worked. She testified that she would place orders to Cranston for shipment of goods and that a bill of lading would then be sent from Cranston to Guilford in New York where Mr. Lewis would generally receive them and deliver them to a Mr. George Elliot (A 43). She had no direct recollection of any of the orders which were the subject matter of the indictment. Miss Kames further indicated that generally she placed orders at the request of Lewis or Goldman.

The next witness was an FBI agent, Luther Senter, who testified that Ivan Goldman's handwriting appeared on Exhibits 2,3,4 and 5 which were records maintained by Cohen which he claimed to have received from Goldman (R 267).

Samuel Smoak, the Controller of Guilford Mills, testified as to the billing procedures at Guilford Mills. He identified the bill of lading and other documents used by Guilford in the shipment of goods including those to Bayer & Eisenberg. He further indicated that cash payments had been received by Guilford Mills on some occasions although that would take place in Greensboro and not New York. With regard to the particular transactions at issue, Mr. Smoak offered his conclusion that Bayer & Eisenberg were not billed for the goods (R 277). On cross-examination Mr. Smoak did concede the billing procedures were far from fool-proof and that on at least one occasion goods were shipped in January 1975, and not billed until March 1976 (R 286-287).

George Greenberg, the President of Guilford Mills testified as to the price of the goods which were the subject matter of the indictment and specifically as to their wholesale value. While he claimed that prices of goods involved in the four counts with which Mr. Goldman was charged would add up to \$4877, \$6417, \$5947 and \$5814, Counts 2,3,4 and 5, respectively, he was unable to document how he arrived at that price.^{*/} He admitted on cross-examination that when he claimed a price of 65¢ a yard, his

^{*/} See, generally, A 44-69.

company, in what were conceded to be legitimate transactions, was charging 25¢ a yard for the same item (A 53). When he sought on redirect to point out that that price was only when it was a sample, he was unable to explain how, for direct billing, the figure of 25¢ a yard was used (A 64-65).

The last two witnesses to testify on behalf of the government were FBI agents. Mr. Dale Hackbart indicated that he had an interview with Mr. Goldman and that appellant made a written statement which was introduced. This statement essentially stated that Mr. Goldman knew Mr. Cohen and had dealings with him, but denied any wrongdoing. Agent Gerard J. Lang testified as to the arrest of Mr. Goldman and that at the time appellant was arrested he denied calling Mr. Cohen. That concluded the case against Mr. Goldman and appropriate motions were thereafter made.

The court granted the dismissal motion as to the conspiracy charge against both Goldman and Lewis and further granted dismissal as to Count 2 against Mr. Goldman on the grounds that the jurisdictional amount of \$5000 had not been established beyond a reasonable doubt.

The appellant's case then proceeded. Two character witnesses who were called on behalf of Mr. Goldman included a textile broker he had dealt with over the years as well as his present employer, who vouched for his reputation and character in the

business community. The other witness for Mr. Goldman was Howard Heller, a salesman at Guilford Mills, who substantiated the fact that the prices of 25¢ a yard for the goods in questions were prices set by management and not an unusual price for the goods which were the subject matter of the indictment (R 379-380). Rudy Lewis testified for himself.

POINT I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THE VALUE OF THE GOODS ALLEGED TO HAVE BEEN STOLEN

The evidence against appellant Goldman was insufficient as a matter of law to sustain a conviction on three counts under Title 18, §2314. Specifically, it is submitted the government failed to establish the \$5000 value required to invoke federal jurisdiction.

The jurisdictional limit set forth in §2314 of \$5000 must be proven beyond a reasonable doubt in order for the government to sustain its burden and establish jurisdiction over the alleged crime. While it has been argued that such jurisdictional amount is as much for the benefit of the government as it is for the defendant, it is, nevertheless, clear that failure to establish proof of value beyond a reasonable doubt is a jurisdictional defect that requires reversal. See United States v. Nall, 437 F.2d 1177, 1187 (5th Cir. 1971) and Schaffer v. United States, 362 U.S. 511 (1960). See, generally, Determination of Value of Stolen Property Within Meaning of Proof of 18 U.S.C. §2314, 15 ALR F.336.

The evidence in the case at bar was insufficient to establish the market value as alleged in the indictment. In fact, the District Court dismissed one count against Mr.

Goldman because of such insufficiency but held the remaining counts were to be submitted to the jury. However, it is appellant's position that the remaining counts 3, 4 and 5 against Mr. Goldman were not proved to the extent of establishing the necessary jurisdictional amount.

The Government called as its sole witness to establish the appropriate market price, the President of the Company, George Greenberg. While the Government sought to use Mr. Greenberg as an expert witness, his testimony was so contradictory and conflicting with the Government's other witnesses, that his testimony must be regarded as questionable, at best. Further, it has been noted by the Fifth Circuit that an owner's testimony of value of goods claimed to be stolen is not sufficient to establish the value under the statute. U.S. v. Nall, supra.

In the case at bar, Mr. Greenberg^{*/} was simply asked by the United States Attorney what his estimate of the wholesale value of the goods allegedly taken by Mr. Goldman is. Mr. Greenberg simply gave his ultimate conclusion of the value involved. (See Appendix pp. A 51-52) No substantiation was given as to how that value was arrived at. On cross-examination Mr. Greenberg admitted there was a substantial difference in the price per yard that he believed accurate, as compared to that which was quoted by Bayer & Eisenberg and Michael Cohen, a difference of 40¢ per yard. (See Appendix, p. A 53) In fact,

^{*/} See Mr. Greenberg's entire testimony at pp. A 44-69.

Mr. Greenberg was unable to explain how his own company could charge 25¢ per yard in a legitimate transaction for the very goods Mr. Greenberg was now claiming a value of 65¢ per yard. (See Appendix, p. A. 64) When pressed to explain this discrepancy the best Mr. Greenberg could offer was that he could not explain the difference "with the documents that I have in my hand". (A. 65)

In fact, it is to be noted that Mr. Greenberg's testimony as to value was directly refuted by the Government's own witnesses Cohen and Eisenberg. Mr. Cohen himself indicates that the price which he quoted Bayer & Eisenberg for the goods in question was arrived at by negotiation between himself and Bayer & Eisenberg. (A. 17) Mr. Eisenberg specifically states that the price he paid for the goods in question was "not unusual". (A. 35) Yet this very price that was not unusual for Bayer & Eisenberg and Mr. Cohen is now claimed by the Government's witness to be at least 40¢ per yard under that claimed by him to be the true value. ^{3/}

Mr. Greenberg as President of Guilford Mills, the company which claimed to suffer the loss herein, should not and could not be an appropriate expert witness to establish the true value of the goods herein. He certainly can be said to have a vested interest in establishing value and cannot be regarded as being in a position to give objective expert opinion sufficient for the jury to rely on in as critical a matter as the value of the goods in question.

^{*}/ See, also, testimony of Howard Heller, a salesman at Guilford, as to the price of the goods (R 379-380).

Inasmuch as there was no objective indicator that can be looked at to determine value of the goods in question, it was essential for the Government to produce sufficient evidence to support a finding beyond a reasonable doubt that the goods in question exceeded \$5,000. (See United States v. Nall, supra, at 1187). Yet, this they did not do. As in the Nall case, the testimony of the owner of the goods claimed to be stolen could not be relied upon to give sufficient testimony as to the value of the goods to convict appellant. This is particularly true where as in the case at bar, the goods in question were "seconds" and thus not amenable to simple valuation formulas. The discrepancy between Mr. Greenberg's testimony and that of the Government's other witnesses and the fact that Mr. Greenberg was an interested witness in the proceedings, rendered his testimony insufficient to establish the necessary value under §2314.

POINT II

UPON DISMISSAL OF THE CONSPIRACY
COUNT IT WAS PLAIN ERROR TO NOT
SEVER APPELLANT'S CASE FROM THAT
OF CO-DEFENDANT LEWIS

Appellant Goldman was prejudiced after the Court dismissed the conspiracy count which was the basis of the joint trial of appellant and his co-defendant Lewis, but nevertheless continued to submit appellant's case with that of Lewis to the jury. While counsel did not specifically

move for severance it is submitted that the error in the Court not severing the defendants was plain error and was otherwise preserved sufficiently by the appropriate motions for acquittal and dismissal. See United States v. Schaffer, *supra*, at p.514-517); see also United States v. Johnson, 515 F.2d 730, 735 (5th Cir. 1975); United States v. Donner, 497 F.2d 184, 195 (7th Cir. 1974); United States v. Russo, 480 F.2d 1228, 1239 (6th Cir. 1973); see also United States v. Marshall, 458 F.2d 446, 451 (2d Cir. 1972).

It is submitted that the case against appellant was marginal at best, but that as a result of his case being submitted to the jury along with that of Lewis, he was severely prejudiced in consideration of the case against him alone. The only direct evidence to involve Goldman in this case was the testimony of the witness Michael Cohen. Unlike the case against Lewis, there was no other testimony to indicate that Goldman had initiated the orders so that he was responsible for such important items as the bill of lading or the billing procedures. Lewis, on the other hand, was specifically shown to have initiated the orders (A40-41) and was testified to as being the person in charge of the bill of lading (A42-43). In addition, the Government throughout the trial and in summation used the evidence of wrongdoing by the defendant Lewis, as proof that appellant Goldman was also a party to the scheme. In closing argument, appellant's counsel had indicated the possibility

that bills of lading can be misplaced and in rebuttal the Government offered the theory that such could not be the case where there are "eight separate transactions" as Mr. Ackerman stated, "Well you may be able to accept the argument if this only happened once, but the fact remains, Ladies and Gentlemen, it happened eight times and all eight times the customer was Bayer-Eisenberg." (A 77 - 78) While appropriate objection was made the damage had already been done. The reference to both Goldman and Lewis as parties to the same scheme appears numerous other times in Mr. Ackerman's summation. (See pp. A 71,73,80,81).

The Government's effort to tie the appellant with the defendant Lewis for purposes of the trial was intentional for evidence against the defendant Lewis added the elements the Government needed to convict appellant Goldman and to prove the credibility of the major witness against him. Nowhere is Goldman shown to have initiated the order, nor to have control over the bills of lading, factors which were necessary to establish Goldman's guilt. Instead, the Government used this evidence as established by Lewis to tar the case of appellant.

Appellant deserved to have his case tried independent of the case against Rudy Lewis once the conspiracy count was dismissed. The jury could not be considered artful enough to be able to distinguish between the evidence admitted as to Goldman and that admitted as to Lewis, nor determine independently the guilt of each man.

It is submitted that the failure of the Court to sever the case between appellant and that of Lewis was plain error and warrants reversal of the conviction herein, and remand for a new trial.

Conclusion

WHEREFORE, it is respectfully requested that for the reasons hereinbefore set forth, a conviction on all three counts be reversed, and if appropriate, the matter set down for new trial. In addition, appellant Goldman joins in such other points as are raised by the co-defendant Lewis to the extent that same are germane to him.

Respectfully submitted,

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